

U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 16Feb2001

Case No.: 2000-LHC-624

OWCP No.: 01-145075

In the Matter of:

EARL EASTMAN,
Claimant

against

BATH IRON WORKS,
Employer

and

**LIBERTY MUTUAL INSURANCE CO.,
AIG BIRMINGHAM FIRE INSURANCE CO.,
COMMERCIAL UNION INSURANCE CO.,**
Carriers

APPEARANCES:

MARCIA CLEVELAND, ESQ.,
On behalf of the Claimant

STEPHEN HESSERT, ESQ.,
On behalf of Employer

JEAN SHA BUDROW, ESQ.,
On behalf of Liberty Mutual Insurance Co.

NELSON LARKINS, ESQ.
On behalf of AIG Birmingham Fire Insurance Co.

KEVIN GILLIS, ESQ.
On behalf of Commercial Union Insurance Co.

BEFORE: RICHARD D. MILLS

Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act (hereinafter "the Act"), 33 U.S.C. § 901, et seq., brought by EARL EASTMAN ("Claimant") against BATH IRON WORKS ("Employer") for injuries allegedly sustained during the construction of a vessel.

The issues raised here could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held September 13, 2000 at Portland, Maine.

STIPULATIONS

Prior to the hearing, the parties agreed to a joint stipulation (JX-1):¹

1. The Claimant was injured September 18, 1998;
2. An employer/employee relationship existed between the Claimant and Respondent at the time of this injury;
3. Respondent was timely advised of and timely filed a notice of controversion to the Claimant's claim;
4. The Claimant's average weekly wage based on the 52 weeks prior to his injury was \$644.72;

ISSUES

The parties also listed the following specific issues as unresolved:

1. Whether Claimant was a voluntary or involuntary retiree;
2. The average weekly wage upon which benefits should be based;
3. Which of the several carriers is the responsible carrier;

¹ The following references will be used: TX for the official hearing transcript; JX-__ for Joint exhibits; CX-__ for the Claimant's exhibits; and RX-__ for Employer's exhibits.

4. The fact of the injury;
5. The nature and extent of the disability.

SUMMARY OF FACTS

I. Employer and Carrier

Initially the Court notes that there are several carriers involved in this dispute. On the day of the hearing, the courtroom was crowded with representatives from the following:

Commercial Union, which insured the Respondent from January 1, 1963 until February 28, 1981.

Liberty Mutual, which was on the risk from March 1, 1981 until August 31, 1986.

Birmingham Fire, who covered the Respondent between September 1, 1986 and August 31, 1988.

Bath Iron Works as a self-insured entity from 1988 until the present and prior to Commercial Union's coverage in 1963.

II. Claimant's Employment and Exposure

Claimant, Earl Eastman, was employed by Respondent, Bath Iron Works, at various times throughout the last forty years. Claimant testified that he first went to work with Bath Iron Works in the early 1960s as a cleaner on the ships in the yard. (TX, pp. 32-33). This job entailed cleaning the engine room or compartments of the ship after the work was completed in the yard. (TX, p. 33). He also stated that asbestos was widely used in the construction of the vessels at that time. He did not remember encountering asbestos because he was not paying special attention to it and did not recall whether he worked with it or encountered its dust. (TX, p. 33). Claimant states that he worked for Employer in this capacity for about six weeks. He then left to work in construction. (TX, p. 34).

In May of 1966 Claimant returned to work at the Employer's facility as a Maintenance carpenter. (EX-16). He worked for them until June of 1970 when he was dismissed for lack of work. (EX-16). During this time, Claimant's job included building maintenance, rebuilding the ways, tearing down and building walls, and installing drop ceilings. He testified that during this period he tore out a lot of things that had pipes behind them and he assumed that the pipes were insulated with asbestos. (TX, p. 35). According to Claimant's testimony, the insulation was a white fibrous material. It was taken off before the Claimant and his co-workers finished the work, but he stated that they were required to clean up the area afterward. (TX, p. 36). Following this period with Employer, Claimant testified that he went to work for a paving company as a batcher. (TX, p. 36).

The Claimant returned to the shipyard, again as a maintenance carpenter in March of 1981. (TX, p. 36, EX-16). Claimant testified that he thought he was exposed to asbestos during this period. He stated, however, that he could not be sure what amount of exposure he suffered. (TX, p. 37). Employer's medical records from this period show that the Claimant's last exposure to asbestos was in 1988. (EX-17, p. 138). Claimant testified that his recollection of the incident was that it occurred while he and his co-workers were removing and replacing a dropped ceiling at the shipyard. In the course of that he testified that they removed the ceiling and discovered that some of the pipe insulation above it had been damaged. (TX, p. 44). Claimant also testified that the medical records from 1990 showing that he no longer worked with asbestos were accurate. (TX, p. 45; EX-17, p. 170).

With respect to the 1988 exposure, Claimant testified that he and his crew encountered what they believed was asbestos while replacing a dropped ceiling. (TX, p. 55-6). He explained that he remembered the material looking like a white fiber. (TX, p. 55). Claimant also testified that while the crew was not wearing masks at the beginning of this job, they did put them on once they realized how dusty the process was. (TX, p. 57). He also testified that they did not discover the asbestos covered pipes until they reached the tiles at the outside of the room. Once they noticed the insulation, he stated that the crew called industrial hygiene to report the problem immediately. (TX, p. 57). It is unclear how long the Claimant was working on that particular job. It is clear, however, that the Claimant was directly exposed to the asbestos for no more than two hours and that for most of that time he was wearing a dust mask or respirator.

Claimant also testified in his deposition that he recalled moving asbestos to a dump in the early 1980s. He testified that this was a regular part of the maintenance crew's job. He states that most of the material was contained in bags and most of those were further contained in dumpsters. (Depo. of Eastman, EX-15, pp. 22-23).

III. Medical Record

The parties have also presented the Court with extensive medical records for the treatment of Mr. Eastman. It appears from the briefs though that the parties are essentially in agreement that the Claimant has asbestosis. The parties certainly agree that Dr. Stephen Mette's opinion is controlling in this regard. His opinion is that, based on the chest X-ray which showed the presence of bilateral pleural plaques, the Claimant has asbestosis. In his October 12, 1998 letter to Dr. Mazora, Dr. Mette defended this conclusion based on the recommendations of the American Thoracic Society. (CX-9, p. 5). Doctor Mette notes that in accordance with those guidelines he used the patient's exposure to asbestos as documented by his work history and pleural plaques, the existence of the appropriate latency period in the Claimant's history, the inspiratory rales heard on physical examination, and the interstitial lung disease not explainable by other etiologies to make his determination. (CX-9, p. 6).

Additionally, the medical records from Bath Iron Works consistently indicate that the Claimant was exposed to asbestos as part of his occupation. (EX-17).

DISCUSSION

Overview

As an initial matter, Claimant's brief makes it very clear that he is not disabled by his condition and currently seeks only medical benefits. Specifically he seeks the recommended annual monitoring for asbestosis. *See Claimant's Brief* at 1 (introduction). We therefore limit our decision to questions integral to those benefits.

I. Jurisdiction

The parties to this case do not contest the Court's jurisdiction. The Claimant was a welder at Employer's shipyard at the time of his injury. He worked either aboard ships in the water or in dry dock or in a building immediately adjacent to the water. The Court finds that the Claimant was an employee within the meaning of section 902 (3) of the Act. Finally we find that the Claimant was employed in a maritime location (a shipyard and dry dock) with respect to section 903(a) of the Act. *See* 33 U.S.C. § 902, 903.

II. Claimant's Disease

The medical records presented to the Court support the conclusion that the Claimant suffers from asbestosis. The parties are apparently in agreement that the Claimant was exposed to asbestos at some point in his intermittent career with the Employer. The parties also apparently agree that we should look to Dr. Mette to determine whether or not the Claimant has asbestosis.

The Court in fact looks at the medical records of Dr. Mette and credits his opinion based on the facts as stated above. (CX-9, pp. 5-6). The Court also reads the medical records of Employer, Bath Iron Works to indicate that the Claimant was exposed to asbestos during his employment with the company. (EX-17). In fact, the Employer and counsel for the various carriers do not dispute that the Claimant was exposed to this toxic substance during the 1960s or 1970s. *See Briefs for Claimant, Employer, and Carrier.*

Finally, it is clear from the medical records and the Claimant's testimony at trial that the Claimant is not physically disabled by his condition. (CX-9, p. 5; TX, pp. 48-50). In fact, Claimant testified at trial that he thought there would be suitable work for him at the Employer into the foreseeable future. (TX, p. 50). Given this evidence and testimony, the Court finds that the Claimant is not currently disabled as a result of his condition. As such, a determination of Nature and Extent and Average Weekly Wage is at this time unnecessary.

III. Responsible Carrier/Employer

The Court finds as suggested by almost all of the parties that the responsible carrier is the carrier at the time of the claimant's last injury. Indeed, the Court follows the U.S. Court of Appeals for the First Circuit's holding in *Liberty Mutual Ins. Co. v. Commercial Union Ins.*, 978 F.2d 750 (1st Cir. 1992). In that case, the court held that "the carrier which last insured the liable employer during the period in which the claimant was exposed to the injurious stimuli and prior to the date the claimant became disabled by occupational disease arising out of his employment and exposure, is responsible for discharging the duties and obligations of the liable carrier." *Id.* at 756.

Our adherence to the *Liberty Mutual* decision must be somewhat tempered, however. The First Circuit in *Liberty Mutual* presumes that the Claimant is actually disabled by his exposure. The decisions thus prescribes that the carrier at the time of the last exposure prior to the disability is the responsible carrier. In this case, however, the Claimant is not disabled by his exposure at the present time. In this instance the Court finds that a determination in keeping with *Liberty Mutual* would base the determination of responsible carrier on the carrier at the time of the last injurious exposure.

Based on this holding, this Court's opinion is that the responsible carrier for this case will be the carrier who held the risk at the time of the last injurious exposure. The Court finds that Claimant was certainly exposed to asbestos in sufficient quantities to cause the disease. Our only question then, is which exposure was the last one to asbestos in this quantity.

Claimant's final alleged exposure occurred in 1988 when he and his crew were removing a dropped ceiling in the quality assurance building at the shipyard and replacing it. According to Claimant's testimony at trial he believed this exposure happened in spring of 1988. (TX, p. 45). Claimant testified that the Crew was working in the room for about two total hours. (TX, p. 56). He testified that there was a lot of dust present during this job. While he and his crew were not originally wearing protective breathing equipment, stated that when they realized how dusty the job was they put on masks. (TX, p. 57-8). The Claimant testified that they were working from the middle of the room out and that it was not until they reached the outside panels that they discovered pipes insulated with asbestos. As soon as they noticed the material, the Claimant testified that they called industrial hygiene and were removed from the area. (TX, p. 57).

The Court does not have reason to doubt that the material the Claimant saw while working on this ceiling was asbestos. We are persuaded that this was injurious exposure to asbestos. Although the Court has reason to believe that the Claimant was wearing a dust mask or respirator by the time he and his crew

discovered the pipes, we find that the Claimant was exposed to free floating asbestos dust before he and his crew put on the masks. Claimant's testimony is otherwise credible, and we have no way of knowing how long it was before the Claimant put on the dust mask. The masks were put on because it was very dusty. In that unknown period of exposure to very dusty conditions it is more likely than not that the Claimant was exposed to dust that contained asbestos fibers sufficient to cause asbestosis. Employer and Carriers provide no evidence that would contradict either the date of this exposure or the extent.

The Court finds based on the testimony that the Claimant's last injurious exposure to asbestos was in spring of 1988 while working at Bath Iron Works. At the time of this exposure the parties agree that Birmingham Fire Insurance was the Carrier. The Court therefore finds that Birmingham Fire is the responsible carrier for purposes of compensation.

IV. Voluntary Retirement

Considering the facts of the case, the Court does not think that the question of whether the Claimant retired voluntarily or not is necessary for us to decide. Claimant is not claiming, and is not entitled to disability benefits. Instead, Claimant seeks medical monitoring for his asbestos related condition. Whether he retired voluntarily or not, the Court finds that Claimant is entitled to this. Thus we need not reach the question of whether he retired voluntarily.

ORDER

1. The Claimant is entitled to medical benefits, specifically annual monitoring of his asbestosis, as a result of his employment related exposure to asbestos. Birmingham Fire, the Carrier of record at the time of Claimant's last exposure in spring of 1988 is hereby ordered to provide appropriate medical benefits;

2. Claimant's Counsel, Marcia Cleveland, shall have 20 days from the receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Employer shall have 20 days from receipt of the fee petitions in which to respond to the petitions.

So ORDERED.

A
RICHARD D. MILLS
Administrative Law Judge

RDM/ct

